

SERVICE DATE - DECEMBER 16, 2016

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 36064

GENESEE & WYOMING INC.—ACQUISITION OF CONTROL EXEMPTION—
PROVIDENCE AND WORCESTER RAILROAD COMPANY

Digest:¹ This decision grants Genesee & Wyoming Inc. authority to acquire control of Providence and Worcester Railroad Company.

Decided: December 15, 2016

On September 1, 2016, Genesee & Wyoming Inc. (GWI), a non-carrier holding company, filed a petition under 49 U.S.C. § 10502 and 49 C.F.R. Part 1121 for exemption from the provisions of 49 U.S.C. §§ 11323-24 to allow GWI to acquire control of Providence and Worcester Railroad Company (P&W), a Class III railroad. In a decision served September 20, 2016, and published in the Federal Register on September 23, 2016 (81 Fed. Reg. 65,692), the Board provided notice of GWI's petition, instituted a proceeding, and set a reply deadline for comments on the petition. The Board received a number of comments in response to the petition.

The Board will grant GWI's petition for exemption, subject to standard labor protective conditions and the condition that GWI will not interfere with the ability of Springfield Terminal Railway (Springfield Terminal) to interchange with CSX Transportation, Inc. (CSXT), in Worcester, Mass.

BACKGROUND

GWI is a publicly-traded non-carrier holding company that currently controls, through direct or indirect equity ownership, two Class II carriers and 106 Class III carriers operating in the United States. (Pet. 1.) P&W is a Class III carrier based in Worcester, Mass., that owns rail lines and permanent freight easements in Connecticut, Rhode Island, and Massachusetts. (Id. at 2.) It also operates on trackage rights in Connecticut, Massachusetts, Rhode Island, and New York. (Id.)

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

In its petition, GWI states that it seeks to acquire control of P&W through a merger between P&W and Pullman Acquisition Sub Inc., a newly-formed, wholly-owned non-carrier subsidiary of GWI.² (*Id.*) Upon consummation, P&W will be the surviving entity and will become a wholly-owned subsidiary of GWI. (*Id.*) P&W connects with several railroads, including two GWI subsidiaries: New England Central Railroad, Inc. (NECR), and Connecticut Southern Railroad, Inc. (CSO). (*Id.* at 3.) GWI states that, although there are some commonly-served cities and towns, there are no customers that are served solely by NECR or CSO, on the one hand, and P&W, on the other, and that as such there will be no “2-to-1 customers” as a result of the proposed transaction. (*Id.* at 3.) GWI states that it does not contemplate any material changes to P&W’s operations, maintenance, or service. (*Id.* at 4.)

GWI also states that P&W and NECR are part of the “Great Eastern Route” strategic alliances. According to GWI, the Great Eastern alliances furnish P&W with pricing authority for service with Canadian National Railway Company (CN) through an arrangement by which NECR provides haulage for P&W between East Alburg, Vt. and Willimantic, Conn. on certain contractually-agreed commodities. GWI states that P&W expanded the Great Eastern Route by entering into an additional strategic alliance with Vermont Rail Systems (VRS), which furnishes P&W with pricing authority for service with Canadian Pacific Railway Limited (CP), through an arrangement by which VRS and NECR provide haulage for P&W between Whitehall, N.Y. and Willimantic, Conn. on certain contractually-agreed commodities. (*Id.* at 3.) GWI states that its present intention is to keep these strategic alliances, and the connections with CN and CP, in place. (*Id.*)

DISCUSSION AND CONCLUSIONS

Statutory Analysis

The acquisition of control of a rail carrier by a person that is not a rail carrier but that controls any number of rail carriers requires approval by the Board pursuant to 49 U.S.C. § 11323(a)(5). Under § 10502(a), however, we must exempt a transaction or service from regulation if we find that: (1) regulation is not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101; and (2) either the transaction or service is limited in scope, or regulation is not needed to protect shippers from the abuse of market power.

In this case, an exemption from the prior approval requirements of §§ 11323-24 is consistent with the standards of § 10502. Detailed scrutiny of the proposed transaction through an application for review and approval under §§ 11323-24 is not necessary here to carry out the RTP. Approval of the transaction will result in a change in ownership of P&W with no lessening of competition. An exemption will promote the RTP by minimizing the need for federal

² In its petition, GWI states that it anticipates closing the transaction in the fourth quarter of 2016. (Pet. 5.) GWI states that, in the event it does not have approval from the Board by the time its closing conditions have been met, it intends to close the transaction into a voting trust. On October 31, 2016, GWI submitted an executed Voting Trust Agreement pursuant to 49 C.F.R. § 1013.3 for receipt of the voting stock of P&W.

regulatory control over the transaction, § 10101(2); ensuring the development and continuation of a sound rail transportation system that will continue to meet the needs of the public, § 10101(4); fostering sound economic conditions in transportation, § 10101(5); encouraging efficient management, § 10101(9); and providing for the expeditious resolution of this proceeding, § 10101(15). Other aspects of the RTP will not be adversely affected.

Nor is detailed scrutiny of the proposed transactions necessary to protect shippers from an abuse of market power. According to GWI, no shipper will lose any rail options, and operations will not materially change. (Pet. 9.) Although P&W connects with NECR and CSO, GWI states that P&W also connects directly with a Class I carrier (CSXT) and indirectly with three other Class I carriers (CP and CN through the strategic alliances, and with Norfolk Southern Railway Company (NSR) through NSR's affiliate, Pan Am Southern, LLC). (*Id.* at 10.) P&W also connects to Pan Am Railways, Inc., New York & Atlantic Railway Company, and Housatonic Railroad Company, Inc., all regional and shortline railroads. (*Id.*) In addition, GWI states that there will be no 2-to-1 shippers as a result of the merger. (*Id.*) Accordingly, based on the record, the Board finds that this transaction does not shift or consolidate market power; therefore, regulation is not necessary to protect shippers from the abuse of market power.³

Comments and Conditions

Many of the commenters support the petition and do not seek any conditions⁴ Other commenters support the petition but request conditions, or express general reservations about the transaction. We address those below.

Passenger Excursion

Several commenters support the petition, but ask the Board to condition granting the petition on GWI's involvement in passenger excursions run by the Blackstone Valley Tourism

³ As there is no evidence that regulation is needed to protect shippers from the abuse of market power, we do not need to determine whether the transaction is limited in scope. See 49 U.S.C. § 10502(a).

⁴ Supporting comments were filed by: Allnex USA Inc.; Atlantic Forest Products; Baldwin Logistics Group, Inc.; BB&S Treated Lumber of New England; Can-Am Trading & Logistics, LLC; Connecticut Department of Transportation; Cushman Lumbar Company, Inc., CWPM, LLC; Delaware Express Co.; Dennison Lubricants, Inc.; Eagle Logistics Group, LLC; Gateway Terminal; Greater Boston Transload, LLC; Intratransit Container, Inc.; Kloeckner Metals; Logistec USA; Mann Distribution LLC; Maple Leaf Distribution Service, Inc.; Maine Department of Transportation; New Hampshire Department of Transportation; Northeast Treathers, Inc.; Resource Recovery, LLC; Rymes Heating Oil & Propane; Safe Road Services, LLC; Saltine Warrior, Inc.; Stella-Jones Corporation; Superior Plastics Extrusion Co. Inc.; T-Branch, LLC; Tunnel Hill Partners, LP; Univar; Vermont Rail System; and Vermont Agency of Transportation.

Council (BVTC)⁵ and/or sought to be run by the Boston Surface Railroad Company (BSRC).⁶ The comments regarding these passenger services vary, but, generally, the commenters⁷ request that the Board require that GWI continue servicing BVTC and continue P&W's negotiations with BSRC.

GWI states that, in the past, P&W and BVTC have made arrangements for service on a year-by-year basis. (GWI Rebuttal 5.) GWI states that P&W will fulfill all current agreements with BVTC, negotiate similar agreements for 2017, and, as P&W has previously done, review further plans for passenger excursion service on a year-to-year basis after that. (*Id.* at 7.) GWI also states that there is currently a memorandum of understanding between BSRC and P&W that includes a commitment to negotiate in good faith. (*Id.* at 5-6.)

The Board will not impose a condition relating to BVTC or BSRC. The Board has authorized BSRC to offer passenger rail service on any rail line where P&W will allow the service. Bos. Surface R.R.—Pet. for Partial Exemption from 49 U.S.C. Subtitle IV, FD 36043 (STB served Sept. 15, 2016). However, authority from the Board is permissive only, and in order to exercise that authority a carrier must obtain the property or contractual right to do so under state law, which is not within the Board's purview. See Ohio River Partners LLC—Acquis. Exemption—Hannibal Dev., LLC, FD 35984, slip op. at 3 (STB served Apr. 1, 2016). A condition requiring GWI to negotiate with BSRC is therefore inappropriate. In any event,

⁵ The record contains little information about the BVTC, other than that it conducts a "Polar Express" excursion and serves over 20,000 passengers annually. (See State Rep. Stephen M. Casey Comment 1.)

⁶ BSRC is a privately funded and closely held company, established to address the growing demand for quality alternatives to driving for commuters between tightly coupled metropolitan markets. BSRC has selected Worcester and Providence as the first city pair for its pilot passenger rail program and has been in negotiations with P&W to host this proposed service. (BSRC Reply 1.)

⁷ Comments were submitted by: BSRC; the Honorable Lisa Baldelli-Hunt, Mayor, City of Woonsocket, Rhode Island; the Honorable Stephen M. Casey, State Representative, State of Rhode Island and Providence Plantations; the Honorable Harriette L. Chandler, State Senator, Commonwealth of Massachusetts; the Honorable Marc A. Cote, State Senator, State of Rhode Island and Providence Plantations; John Eno; the Honorable James R. Langevin and the Honorable David N. Cicilline, United States Representatives, Rhode Island; Massachusetts Bay Railroad Enthusiasts, Inc.; the Honorable James P. McGovern, United States Representative, Massachusetts; the Honorable Michael A. Morin, State Representative, State of Rhode Island and Providence Plantations; the Honorable David K. Muradian, Jr., State Representative, Commonwealth of Massachusetts; National Association of Railroad Passengers; the Honorable James J. O'Day, State Representative, Commonwealth of Massachusetts; the Honorable Robert D. Phillips, State Representative, State of Rhode Island and Providence Plantations; Michael E. Traynor, Chief Development Officer, City of Worcester, Massachusetts. BSRC also submitted a letter from Peter Alviti, Jr., Director of the Rhode Island Department of Transportation, expressing general support for BSRC's passenger rail service.

GWJ has stated that it will continue to negotiate in good faith with BSRC and BVTC. (GWJ Rebuttal 7.)

Springfield Terminal

Springfield Terminal filed a comment regarding its ability to interchange traffic with CSXT at Barbers Station in Worcester, Mass. (Springfield Terminal Comment 1.) Springfield Terminal states that GWJ has agreed that it will not take or fail to take action that would adversely impact Springfield Terminal's ability to interchange traffic with CSXT at Barbers Station. (*Id.*) Based on this representation, Springfield Terminal states that it fully supports the petition.

Springfield Terminal also notes that GWJ agreed to have Board approval conditioned on GWJ's commitment as reflected in Springfield Terminal's letter, and in its rebuttal GWJ confirms that its commitment can be entered as a Board-imposed condition. (GWJ Rebuttal 3.) Accordingly, the Board will impose a condition requiring that GWJ will not take or fail to take any actions that would adversely impact the ability of Springfield Terminal to interchange traffic with CSX Transportation, Inc. at Barbers Station in Worcester, Massachusetts in violation of applicable law or the P&W Grant of Trackage Rights, as amended, dated June 30, 1989.

Other Concerns

The Massachusetts Department of Transportation (MassDOT) and American Rock Salt (ARS) filed comments expressing reservations regarding the transaction.

MassDOT states that it takes no position concerning the competition aspect of GWJ's petition, but it notes its interest in P&W continuing its current high standards of track maintenance under a GWJ regime. It also indicates that service over a nearby GWJ subsidiary line has deteriorated, leading to passenger train service disruption. (MassDOT Comment 1.) MassDOT seeks GWJ's assurance that the P&W merger "will not compromise or delay steps that GWJ will need to take going forward to restore Amtrak service on another GWJ railroad" (*Id.*) MassDOT, however, does not specifically ask the Board to impose any conditions.

ARS states that it is a shipper that receives service from several other GWJ subsidiaries. It states that GWJ's growth over the past 20 years has led to ARS being captive to GWJ's rate structures, which impacts its market share. Although ARS has raised a number of concerns regarding service from other GWJ subsidiaries, ARS does not ask that a specific condition be placed on this transaction. (See generally ARS Comment.)

While the Board takes seriously the concerns expressed by MassDOT and ARS, neither party has suggested a condition or identified any harm arising from the transaction that would necessitate imposing a condition. The Board expects, however, that GWJ will work with

MassDOT and ARS to help address any unforeseen service impacts, should they arise, following the transaction's approval.⁸

Labor

Under 49 U.S.C. § 10502(g), the Board may not use its exemption authority to relieve a rail carrier of its statutory obligation to protect the interests of its employees. Therefore, the Board will impose a condition specifying that any employees adversely affected by this transaction will be protected by the conditions set forth in New York Dock Railway—Control—Brooklyn Eastern District Terminal (New York Dock), 360 I.C.C. 60 (1979).

GWJ, acknowledging that New York Dock applies, seeks Board confirmation that it need not commence negotiations or consummate implementing agreements prior to the consummation of the transaction with P&W. (Pet. 10-11.) The Transportation Communications Union/IAM, AFL-CIO (TCU/IAM) and the Transportation Division of the International Association of Sheet Metal, Air, Rail and Transportation Workers (SMART-TD) submitted comments disagreeing with GWJ's position, arguing that GWJ must give notice and negotiate an implementing agreement prior to consummation of the transaction. (See TCU/IAM Comment 3, 5-6; SMART-TD Comment 3-5.)

New York Dock requires a railroad to give notice of "proposed changes to be effected by [a] transaction" when a railroad is "contemplating a change or changes in its operations, services, facilities, or equipment as a result of a transaction" that may affect employees. 360 I.C.C. at 77. The requirement under New York Dock to provide such notice presumes, however, that the carrier is capable of making a "full and adequate statement" of the expected labor changes before the transaction is consummated. Norfolk S. Ry—Joint Control & Operating/Pooling Agreements—Pan Am S. LLC (Pan Am S.), FD 35147, slip op. at 16-17 (STB served Mar. 10, 2009) ("Because we see no basis for negotiation of an implementing agreement until Applicants decide to implement labor changes that are related to the Transaction, we will not require that Applicants commence negotiations now.").

In its petition, GWJ states that it has not yet determined whether or which employees may be adversely affected, but acknowledges that it will be required to give 90-days' notice, and negotiate, before making changes in operations, services, facilities, or equipment. (Pet. 11.) Further, in its rebuttal,

GWJ specifically confirms that post-closing, P&W does not intend to terminate or displace any P&W covered employees as a result of the proposed transaction. P&W will continue to honor all current [collective bargaining agreements

⁸ The Board reminds interested parties that they may contact the Board's Rail Customer and Public Assistance Program (RCPA) if they believe a rail carrier is not providing adequate service. The RCPA Program provides informal assistance on a wide range of matters, including informal dispute resolution through mediation. The RCPA may be reached at (866) 254-1792; faxing to (202) 245-0461; or by email at rcpa@stb.gov.

(CBAs)], and to negotiate all expired CBAs in good faith. For the foreseeable future, there will be no adverse effect on P&W covered employees because work will continue to be performed under existing CBAs by the same P&W covered employees who are currently performing the work.

(GWI Rebuttal 9).

The Board will hold GWI to the representations regarding labor protection that it has made on the record in this proceeding. Accordingly, GWI will be required to proceed in good faith under the notification and negotiation provision of Article I, section 4 of the New York Dock conditions before implementing employment changes but it need not commence those negotiations until it is capable of making a full and adequate statement of the expected changes. See Pan Am S., FD 35147, slip op. at 16-17.⁹

⁹ TCU/IAM and SMART-TD cite other cases in support of their position that New York Dock negotiations must occur prior to the consummation of a consolidation transaction. The Board, however, finds these cases unpersuasive. First, TCU/IAM cites Norfolk Southern Railway—Acquisition & Operation—Certain Rail Lines of the Delaware & Hudson Railway (Delaware & Hudson), FD 35873 (STB served May 15, 2015). (TCU/IAM Comment 2.) The labor discussions in Delaware & Hudson, however, focus almost entirely on how to categorize the underlying transaction and what level of labor protection applies. Delaware & Hudson, FD 35873, slip op. at 28 (STB served May 15, 2015). Here, there is no dispute that New York Dock protections apply (see Pet.; TCU/IAM Comment; SMART-TD Comment). Thus, Delaware & Hudson is inapposite.

Next, SMART-TD points to R.J. Corman Railroad/Memphis Line—Acquisition—CSX Transportation Line Between Warwick & Uhrichville, FD 31388 (ICC served Mar. 2, 1989). (SMART-TD Comment 3.) In that case, however, CSXT acknowledged that some of its employees would be adversely affected, which is not the case here. R.J. Corman R.R., slip op. at 2.

SMART-TD also challenges GWI's reliance on Atlantic Richfield Co. & Anaconda Co.—Control—Butte, Anaconda & Pacific Railway & Tooele Valley Railroad, 5 I.C.C. 2d 934 (1989), and Mid Michigan Railroad—Lease & Operation Exemption—Missouri Pacific Railroad, FD 31646 (ICC served Aug. 17, 1990), though neither case is cited by GWI. (SMART-TD Comment 4.) Atlantic Richfield states that minimum New York Dock protections are warranted even when assurances are made that there will be no adverse effects to employees. Atlantic Richfield, 5 I.C.C. 2d at 942 n.9. Here, however, GWI is not suggesting that the New York Dock requirements do not apply. Finally, Mid Michigan examines the differing requirements between New York Dock and New York Dock as modified by Wilmington Terminal Railroad—Purchase & Lease—CSX Transportation, Inc., 6 I.C.C. 2d 799 (1990), a discussion not at issue here. See generally Mid Michigan, FD 31646.

Environmental and Historical Reporting

This transaction is categorically excluded from environmental review under 49 C.F.R. § 1105.6(c)(2)(i) because it will not result in any significant change in carrier operations. Similarly, the transaction is exempt from the historic reporting requirements under 49 C.F.R. § 1105.8(b)(3) because it will not substantially change the level of maintenance of railroad properties.

Expedited Action

GWJ requests expedited action on its petition for exemption. (Pet. 12; see generally GWJ Letter, Dec. 7, 2016.) It seeks action on or before the date P&W shareholder approval is obtained, and in the event that such approval is not obtained before shareholder approval, expedited action to avoid a prolonged period of interim control of operations via a voting trust. Based on the record, the Board finds GWJ's request to be reasonable. Accordingly, our grant of the exemption will be effective immediately.

It is ordered:

1. Under 49 U.S.C. § 10502, the Board exempts GWJ's acquisition of control of P&W from the prior approval requirements of §§ 11323-24 subject to the employee protective conditions in New York Dock Railway—Control—Brooklyn Eastern District Terminal, 360 I.C.C. 60 (1979).

2. The exemption is further conditioned on GWJ's assurance that it will not take or fail to take any actions that would adversely impact the ability of Springfield Terminal to interchange traffic with CSX Transportation, Inc. at Barbers Station in Worcester, Massachusetts in violation of applicable law or the P&W Grant of Trackage Rights, as amended, dated June 30, 1989.

3. Notice will be published in the Federal Register.

4. This exemption will be effective December 16, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.